

THIS DECISION IS NOT
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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Elegant Headwear Co., Inc.

Serial No. 76529918

Myron Amer for Elegant Headwear Co., Inc.

Melissa Vallillo, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

Before Quinn, Hairston and Holtzman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Elegant Headwear Co., Inc.
to register the mark MEGA-LOFT for "hats."¹

The trademark examining attorney refused registration
under Section 2(d) of the Trademark Act on the ground that
applicant's mark, when applied to applicant's goods, so
resembles the previously registered mark MEGALOFT for

¹ Application Serial No. 76529918, filed June 19, 2003, based on
an allegation of a bona fide intention to use the mark in
commerce.

"insulating fabric for clothing"² as to be likely to cause confusion.

When the refusal to register was made final, applicant appealed. Applicant and the examining attorney filed briefs.³ An oral hearing was not requested.

The examining attorney maintains that the marks are essentially identical and that the goods are related. In support of the refusal, the examining attorney submitted an Internet web page from an on-line retailer offering insulated hats for sale, and pointing out that the hats bear the mark of the manufacturer as well as a mark indicating the source of the insulation fabric; and third-party registrations showing that hats and other clothing items, as well as insulation fabric, may be produced by the same entity.

Applicant argues that the involved goods are different because the goods are classified in different International Classes, and that the third-party registrations relied upon

² Registration No. 2522548, issued December 25, 2001.

³ During examination, the examining attorney inquired as to whether the mark had any significance. It was not until the reply brief that applicant indicated it "does not know or believe that MEGA-LOFT has any significance in the relevant trade, any geographical significance or any meaning in a foreign language." Although it would have been preferable, of course, for applicant to timely respond to the inquiry, we find that applicant has satisfactorily complied with the inquiry.

by the examining attorney do not support the refusal. Applicant's briefs make no mention of the marks.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant's mark MEGA-LOFT and registrant's mark MEGALOFT are virtually identical in appearance, differing only in the addition of a nondistinctive hyphen in the middle of applicant's mark. This is not a significant difference. See *Seaguard Corp. v. Seaward International, Inc.*, 223 USPQ 48 (TTAB 1984). The marks are identical in sound and meaning, and engender virtually identical overall commercial impressions. Average consumers, who normally retain a general rather than a specific impression of

trademarks, hardly can be expected to remember the extremely minor difference between the marks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Even if they remembered that registrant's mark did not include a hyphen, it is unlikely that consumers would rely on the absence or the presence of a hyphen to distinguish the marks. This virtual identity between the marks weighs heavily in favor of a finding of likelihood of confusion.

With respect to the goods, where virtually identical marks are involved, as is the case here, the degree of similarity between applicant's and registrant's goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-89 (Fed. Cir. 1993); and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001).

It is not necessary that the respective goods be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they

originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In comparing applicant's "hats" to registrant's "insulating fabric for clothing," we note, at the outset, the Board has found in the past that confusion may result from the contemporaneous use of the same or similar marks on fabrics for clothing and on clothing items. See Warnaco Inc. v. Adventure Knits, Inc., 210 USPQ 307, 315 (TTAB 1981) and cases cited thereat.

In the present case, the examining attorney submitted third-party registrations of three entities showing that each entity adopted the same mark for insulating fabric and clothing items. (See, e.g., GORE-TEX for "fabric for the manufacture of clothing" and "headwear"). Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

In addition, the examining attorney relied upon an Internet web page of an on-line retailer (www.tracker-outdoors.com) showing listings for insulated hats. The web page highlights hats insulated with GORE-TEX®, including "RedHead Gore-Tex Woodsman Insulated Hat." Thus, the

examining attorney's assessment that "insulated hats may bear the mark of the manufacturer as well as a mark indicating the source of the insulating fabrics from which the goods are made" is a reasonable one.

In sum, we find that the examining attorney's evidence shows that the goods are commercially related. The relatedness of the goods weighs in favor of finding a likelihood of confusion.

We recognize that insulating fabric most likely will be sold in wholesale and distribution trade channels to hat manufacturers, while hats will be sold through retail outlets to the general public. Nonetheless, as shown by the examining attorney's evidence, the ultimate consumer may well encounter both marks identifying the insulating fabric and the hat, respectively.

Applicant's attempt to differentiate the goods based on the classification system is ill-founded. The classification of goods and services has no bearing on the question of likelihood of confusion. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); and *National Football League v. Jasper Alliance Corp.*, 16 USPQ 1212, 1216 n.5 (TTAB 1990).

A final point hardly deserves mention. In the first Office action, the examining attorney, in addition to

citing the involved registration, mistakenly indicated that a search of Office records revealed no similar registered marks which would bar registration under Section 2(d). Applicant somehow construes this inconsistency as showing the error of the final refusal. Suffice it to say, applicant's argument is not well taken.

We conclude that purchasers familiar with registrant's insulating fabric for clothing sold under its mark MEGALOFT would be likely to believe, upon encountering applicant's mark MEGA-LOFT for hats, that the goods originate with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.